

Final

**RHODE ISLAND SUPREME COURT
ETHICS ADVISORY PANEL
OPINION NO. 97-16, REQUEST NO. 722
Issued September 11, 1997**

Facts:

The inquiring attorney referred an individual who was involved in an accident in another state to an attorney licensed to practice law in that state. The inquiring attorney, who is not licensed in the state where the accident occurred, had offered to locate an attorney for the individual. To that end, the inquiring attorney gathered some facts relating to the accident, identified an attorney for the case, and communicated with the attorney, making inquiries as to whether the attorney handled this type of case. Recently the out-of-state attorney notified the inquiring attorney that the case has been settled, and sent him/her a check for the inquiring attorney's share of the fee. There was no written agreement with the client by which each lawyer assumed joint responsibility for the representation. The inquiring attorney has no knowledge of the amount of the settlement or the fee arrangement between the out-of-state attorney and the individual.

Issues Presented:

The inquiring attorney asks whether the Rules of Professional Conduct permit him/her to share the attorney's fee and to keep the money.

Opinion:

Where lawyers divide a fee without regard to the amount of work performed, Rule 1.5(e) requires a written agreement with the client by which the lawyers assume joint responsibility for the representation. In the absence of such an agreement, Rule 1.5(e) does not permit the inquiring attorney to share the attorney's fee.

Reasoning:

Rule 1.5(e), which addresses the division of fees between attorneys, states:

- (e) A division of a fee between lawyers who are not in the same firm may be made only if:
 - (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
 - (2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

The former Code of Professional Responsibility required that fees be divided in proportion to both the services performed and the responsibility assumed by the lawyers. See former DR 2-107 (A)(2). Rule 1.5(e)(1) uncouples services and responsibility, permitting a division of fees *either* if the division is in proportion to the services performed by each lawyer, *or* if each lawyer by written agreement with the client assumes joint responsibility for the representation.¹ See ABA/BNA Law. Man. of Prof. Conduct at 41:707 (1991 Supp.). In addition, the total fee must be reasonable. Rule 1.5(e)(3).

Although proportionality is no longer a requirement under Rule 1.5(e), simply referring a case or a client to another lawyer is not sufficient to make a fee-splitting arrangement ethical under the Rules. See ABA/BNA Law. Man. on Prof. Conduct, at 41:709. If the division of fees is not based upon an allocation of services, the Rule requires a writing by which the referring lawyer agrees to assume joint responsibility for the representation. The requirement of a writing indicates that the rule was intended to add to the protection already available to the client by providing a contractual remedy in addition to the remedy available under the law of negligence. N.Y. City Bar Assoc. Comm. on Prof. Ethics, Op. 715 (1996).

The Panel agrees with the New York City Committee on Professional Ethics which has stated that "joint responsibility" is synonymous with joint and several liability, and further agrees that the "joint responsibility" requirement is financial and does not impose an obligation on the referring attorney to supervise the receiving attorney. Id. In order to share a fee without regard to work performed, lawyers are ethically obligated under Rule 1.5(e) to accept vicarious liability for any malpractice that occurs during the course of the representation. Id.

The Panel is also of the opinion that a Rhode Island lawyer may share a fee with an out-of-state attorney provided the Rhode Island attorney, by written agreement with the client, assumes joint responsibility, i.e., accepts the financial consequences of the referral, and provided further that sharing a fee is permitted under the ethical rules of the other state. See Michigan State Bar Comm. on Prof. and Judicial Ethics Op RI-199 (1994).

In the instant inquiry, the inquiring attorney did not perform work on the case. In order to share in the fee, he/she was required to assume, by written agreement with the client, joint responsibility for the representation. There being no such written agreement, the panel concludes the inquiring attorney is not permitted to share the attorney's fee.

¹Comparable ethical rules in other states allow referral fees by eliminating references to proportionality and shared responsibility. See e.g., Cal. Rule 2-20(A); Mich. Rule 1.5(e).

